MAIKO WOODS MARITIME & PROPERTIES SDN BHD & ORS *a*

v.

ASIA COMMERCIAL FINANCE (M) BHD

HIGH COURT MALAYA, KUALA LUMPUR *b*
RK NATHAN JC
[SUIT NO: S2-22-457-1996]
25 AUGUST 1997

CIVIL PROCEDURE: *Disposal of action without trial - Striking out - Rules of the High Court 1980, O. 18 r. 19* *c*

CIVIL PROCEDURE: *Jurisdiction - Limitation period - Limitation Act 1953, s. 29*

CIVIL PROCEDURE: *Res judicata - Estoppel - Action to set aside previous judgment on ground of fraud* *d*

The defendant, a finance company, had approved a fixed term loan to the plaintiffs who are housing developers. The plaintiffs filed an action against the defendant for breach of the provisions of the loan agreement and the charge annexure. The plaintiffs argued that they were induced by the defendant's representations to execute the loan agreement and the charge, and that due to this they had gone ahead with their preparations and plans for their housing developing scheme. The plaintiffs claimed recession of the said loan agreement, special and general damages, cancellation of the memorandum of charge, interest and costs. The defendant on the other hand filed an application to strike out the plaintiffs' statement of claim. The Senior Assistant Registrar dismissed the defendant's application with costs and the defendant appealed. *e* *f*

In the action against the defendant, the plaintiffs pleaded duress, fraud, fraudulent misrepresentation or concealment by fraud and mistake. The defendant on the other hand relied on the grounds of limitation, and *res judicata* and issue estoppel to strike out the plaintiffs' writ and statement of claim. *g*

Held:

[1] The court will only strike out claims in clear and unambiguous cases. A litigant should not be denied justice, except when his cause of action is non-existent or is frivolous and vexatious, that it will be an abuse of the process of the court to grant him access to the courts. *h*

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[2] *Derry v. Peak* lays down the principle that there is no fraud without an intention to deceive, and a defendant is not liable for any statement made if such statement is made in the honest belief that it is true. Here although the defendant was aware of the report submitted by Coopers & Lybrand, that it should not disburse the Tabung's funds as it is a finance company and therefore arrangements should be made with a commercial bank to disburse the funds instead, it nevertheless went ahead and made representations to the plaintiffs that it was a bank.

[3] Once there is fraud and evidence shows that the issue of fraud has not been fully argued in an earlier proceeding, the issue of *res judicata* should not prevent the issue of fraud from being fully argued. Where there is an allegation of fraud, the court must see that all aspects of fraudulent connotations relating to the case are argued fully, so that the issue of fraud is put to rest with finality without it rising in the same action. The defendant's application to strike out should be rejected as the whole allegation of fraud must be completely investigated by *viva voce* evidence at trial.

[Appeal dismissed with costs.]

Cases referred to:

Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 ***(foll)***

Derry v. Peek [1889] 14 AC 337 ***(foll)***

Dr Ramachandran Sivaguru v. Perwira Habib Bank Malaysia Bhd & Anor [1993] 3 CLJ 635 ***(refd)***

Legislation referred to:

Finance Companies Act 1969, s. 6

Limitation Act 1953, s. 29

Rules of the High Court 1980, O. 14, O. 18 r. 19

For the plaintiffs - Bosco Philip Anthony (Vasanthan Gopalan with him); M/s Bosco Philip Anthony & Assoc

For the defendant - CW Teo; M/s Khaw & Hussein

JUDGMENT

RK Nathan JC:

Facts

The 2nd plaintiff is a director of the 1st plaintiff. The 3rd, 4th and 5th plaintiffs are the joint registered proprietors of a property held under Lot No. 1182 Geran 10570 Mukim of Kuala Nal, Daerah Batu Mengkubang, Kelantan (the said land) and have given an irrevocable power of attorney to the 1st

plaintiff. The defendant is a finance company. The 1st plaintiff was incorporated on 16 July 1982 and had converted the said land from agriculture to housing and had obtained a housing developer's licence and an advertisement and sale permit for the building of residential homes and shophouses on the said land known as the Taman Desa Aman Housing Development Scheme (the scheme).

On or about 21 October 1985 the 1st plaintiff obtained an approval for bridging finance facilities amounting to RM1,600,000 and end finance facilities amounting to RM3,500,000 from Bank Kerjasama Rakyat Malaysia Berhad (Bank Rakyat). The letter of approval from Bank Rakyat was dated 30 December 1985. Between 3 March 1987 and 10 December 1987 the defendant approved a fixed term loan of RM2,000,000 on various conditions, upon the plaintiffs executing the loan and charge documents. It was also a condition that the period of the loan shall not exceed three years from the date of first drawdown.

Plaintiffs' Case

It is the plaintiffs' case that they were induced by representations to execute the loan and charge documents. It was also the plaintiffs' contention that between 10 December 1987 and 25 May 1988, on the faith and truth of the defendant's representations and the subsequent execution of the loan agreement and charge documents, the plaintiffs appointed:

(a) law firms to prepare the sale and purchase agreements for the said scheme;

(b) consultants to prepare and finalise the total development cost of the project;

(c) a main contractor to commence construction and to complete the scheme;

(e) a firm of architects to certify and issue the architect's certificates for progress payments.

The plaintiffs are therefore claiming for recession of the said loan agreement, special and general charges, cancellation of the memorandum of charge dated 10 December 1987, interest and costs.

Case For The Defence

The defendant filed an application to strike out the statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 (the RHC) on the grounds that the statement of claim disclosed no reasonable cause of action and/or that it is scandalous or vexatious and/or that it is an abuse of the process of the court.

The learned SAR having heard the said application dismissed it with costs. Hence this appeal by the defendant before me.

Court's Findings

It is clear to me that there is a dispute as to whether the loan provided by the defendant is a fixed term loan or an on demand loan. The plaintiffs have argued that the defendant had breached the fixed term loan agreement by treating it as an on demand loan and thereby exercising its rights to stop progress release of the loan. The 1st plaintiff contended that this was in breach of cl. 1(1) of the loan agreement. The defendant on the other hand argued that upon the default by the 1st plaintiff in servicing the monthly interest in arrears of the said loan, the defendant demanded from the 1st plaintiff the payment of the monthly interest in arrears. When the 1st plaintiff failed to settle the said arrears the defendant, by its solicitors' letter demanded from the plaintiffs payment of the whole outstanding amount of the said loan.

To my mind the existence of this dispute which goes to the very foundation of either party's claim, is sufficient to warrant a dismissal of this appeal.

It is only in clear and unambiguous cases that the court will resort to striking out a claim. The law journals are replete with cases that echo this principle which is trite. No litigant ought to be denied entrance to the portals of justice save and except when his cause of action is obviously non existent or is so blatantly frivolous and vexatious that it would be an abuse of the process of the court to grant him access to the courts. The hallowed halls of justice must reverberate with the pounding feet of those litigants seeking a forum to ventilate their rights. No cause of action ought to be struck down, nor a right to be heard refused so long as the court finds a cause of action, whether as pleaded, or whether by inference from the facts pleaded.

In any case I gather from the evidence that on 7 January 1989 the 1st plaintiff commenced legal proceedings against the defendant in the Kuala Lumpur High Court by way of Civil Suit No. D3-22-34-89 (the D3 suit) claiming special and general damages for breaching the loan agreement. Then on 25 January 1989 the defendant commenced legal proceedings against the 1st plaintiff as the borrower of the said loan and against the 2nd plaintiff and another director of the 1st plaintiff as guarantors. This suit was also filed in the Kuala Lumpur High Court by way of Civil Suit No. D4-22-202-89 (the D4 suit) for the recovery of the total outstanding amount under the loan agreement.

After the filing of both the D3 and the D4 suits the 1st plaintiff applied for a soft loan from Tabung Pemulihan Usahawan (the Tabung) which was set up by Bank Negara Malaysia to assist housing developers who found

themselves in financial difficulties during the recession period. The defendant was requested by Bank Negara to withhold its D4 action pending the Tabung's decision on the 1st plaintiff's application for the said soft loan. Subsequent to negotiations between the Tabung, the defendant and the 1st plaintiff, the defendant with the consent of the Tabung, granted the 1st plaintiff an additional loan of RM4.5 million to enable the 1st plaintiff to complete the project subject to various conditions, one of which was that the 1st plaintiff ought to withdraw all proceedings against the defendant. The 1st plaintiff withdrew the D3 suit on 9 January 1991. Another condition was that one of the securities for the Tabung loan was to be a fixed charge in favour of the defendant over the said land. However, since the 1st plaintiff was unable to get the 3rd to 5th plaintiffs together with the other director to charge the said land in favour of the defendant the Tabung withdrew the loan. The defendant therefore continued with the D4 proceedings and on 13 Janury 1995 the court entered judgment for the defendant against the 1st and 2nd plaintiffs and the 1st plaintiff's counterclaim was dismissed.

On 4 June 1993 the defendant commenced foreclosure proceedings in the Kuala Lumpur High Court by way of Originating Summons No. S2-24-490-93 (the S2 suit) against the 3rd to 5th defendants and the other director applying for an order of sale against the said land and on 29 June 1995 the court granted the said order of sale.

In the present action the plaintiffs have pleaded duress, fraud, fraudulent misrepresentation or concealment by fraud and mistake. The plaintiffs must be given an opportunity to be heard. One of the grounds for applying to strike out the writ and statement of claim is based on limitation.

Limitation

The defendant points out that the plaintiffs' claim against the defendant is for alleged breaches by the defendant of the provisions of the loan agreement and the charge annexure. The plaintiffs had pleaded that they were induced by the defendant to execute the loan agreement and the charge. It was argued by the defence that since the plaintiffs were relying on the two alleged breaches by the defendant of the provisions of the loan agreement and charge annexure on 28 Janury 1988 and 22 September 1988 respectively and since this suit was commenced on 30 September 1996 the six year period of limitation had already lapsed. Alternately the defendant suggested that the cause of action would have accrued on 23 November 1988 when the defendant demanded from each and everyone of the plaintiffs the payment of the whole outstanding amount under the said loan.

On the other hand, the plaintiffs rely on s.29 of the Limitation Act 1953 (Act 254) which reads:

> 29. Postponement of limitation period in case of fraud or mistake.
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> Where, in the case of any action for which a period of limitation is prescribed by this Act, either -
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:
>
> Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which:
>
> (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
>
> (ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

The plaintiffs contend that the defendant well knew that it could not in any event be used as a vehicle to disburse the loan from the Tabung by virtue of it being a finance company. The plaintiffs alleged that the defendant in masquerading as a bank had fraudulently represented to the plaintiffs that it had the authority to deal with the plaintiffs and to allow the plaintiffs the availability of the line of credit. By using this offer as a means of leverage to persuade the plaintiffs to withdraw their earlier D3 action the plaintiffs argued that evidence must be led to ascertain when the plaintiffs became aware of the fraudulent machinations of the defendant.

Res Judicata And Issue Estoppel

The next ground relied on by the defendant to strike out the statement of claim is *res judicata* and issue estoppel. The defendant argues that the plaintiffs' claim against the defendant in this suit is based on the same purported breaches

by the defendant of the provisions in the loan agreement and the charge annexure which the 1st plaintiff and the 2nd plaintiff had raised in the D4 suit and since that suit was decided in favour of the defendant, the defendant argued that *res judicata* and issue estoppel would apply. In respect of the 3rd to the 5th plaintiffs' claims, it was urged upon me, that since their claims against the defendant would depend on whether the defendant had breached the provisions of the loan agreement and the charge annexure and since this issue had already been decided in the D4 suit, the 3rd, 4th and 5th plaintiffs are estopped from attempting to relitigate this issue. In support the defendant relied on *Dr. Ramachandran a/l Sivaguru v. Perwira Habib Bank Malaysia Berhad & Anor* [1993] 3 MLJ 59.

In the present case, fraud has been pleaded. It is well settled since *Derry v. Peek* [1889] 14 AC 337 that there can be no fraud without an intention to deceive and further the defendant would not be liable for any statement made if such statement was made in the honest belief that it was true. This, to my mind, can only be ascertained at trial and not merely by affidavit evidence.

It is clear from the evidence so far adduced that the defendant is only a finance company and not a bank. It must be noted that the 1st plaintiff was advised by the secretariat to the Tabung to appoint Coopers & Lybrand as the financial consultant. The said Coopers & Lybrand submitted a report to the Tabung in which *inter alia* they stated that the defendant should not be used as a vehicle to disburse the Tabung's funds by virtue of it being a finance company and that therefore arrangements should be made with a commercial bank to disburse the funds. Although the defendant was aware of this report yet it went ahead and made representation to the 1st plaintiff that it was a bank.

The Banking and Financial Institutions Act 1989 (Act 372) gives various pertinent definitions of terms relevant to the case.

"Bank" means the Central Bank of Malaysia established by the Ordinance.

"bank" means a person which carries on banking business.

"banking business" means:

(a) the business of -

(i) receiving deposits on current account, deposit account, savings account or other similar account;

(ii) paying or collecting cheques drawn by or paid in by customers; and

(iii) provision of finance; or

(b) such other business as the Bank, with the approval of the Minister, may prescribe.

"finance company" means a person which carries on finance company business.

"finance company business" means:

(a) the business of receiving deposits on deposit account, savings account or other similar account; and

(b) (i) the lending of money;

(ii) leasing business; or

(iii) the business of hire-purchase, including that which is subject to the Hire-Purchase Act 1967; or

(c) such other business as the Bank, with the approval of the Minister, may prescribe.

Section 6 of the Finance Companies Act 1969 (Act 6) prohibits a finance company from carrying out various acts. The said section reads:

6. Prohibition of certain dealings by licensed borrowing company.

Nothing in this Act shall authorise a licensed borrowing company to -

(a) accept any money on deposit or loan which is repayable on demand by cheque, draft, order or any other instrument drawn by the depositor on the licensed borrowing company; or

(b) deal in -

(i) gold; or

(ii) foreign currency.

Whether the defendant had fraudulently represented to the 1st plaintiff that it was a bank or whether the 1st plaintiff ought to have implied knowledge that the defendant is not a bank and that therefore could not be authorised to deal with the funds are matters that have yet to be decided. Besides once fraud raises its ugly head and evidence disclosed reveals that the subject of fraud had not been fully canvassed in any earlier proceedings, it is my judgment that the issue of *res judicata* ought not to prevent the subject of fraud from being fully ventilated. Whether it ought to have been earlier discovered or whether it ought to have been fully argued earlier is not the question. The principle to be adopted ought to be that once fraud lifts its head above the murky waters of litigation and like the legendary multi-headed hydra sprouted a head each time one was lopped off, it is the paramount due of the court to

see that all aspects of fraudulent connotations relating to the case are canvassed fully so that the issue of fraud is put to rest with finality without it springing up again and again in the same action. It is on this score that I hold that the application to strike out ought to be rejected as the whole allegation of fraud must be completely investigated and that means through *viva voce* evidence at trial.

In fact I can do no better than follow in the footsteps of the then Supreme Court in *Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 SC which held that a decision, whether a claim or answer, is, on the face of it "obviously unsustainable", cannot be made by a minute examination of the documents and facts of the case; so long as some issues are raised which require serious consideration, leave to defend ought to be given.

The defendant relied on *Dr. Ramachandran (supra)*. In that case the plaintiff filed fresh proceedings to impeach an earlier judgment on which he had not appealed. The subsequent suit to impeach was based on allegations of fraud and misrepresentation. The earlier judgment was on an O. 14 application where none of these allegations were raised. The defendant applied by way of O. 18 r. 19 of the RHC to strike out the statement of claim on the basis that since all the allegations of fraud and misrepresentation were available to the plaintiff then, the principle of *res judicata* ought to apply. The judgment in the citation referred to by the defence is the judgment of the High Court which held that since all the objections raised by the plaintiff in the case could easily have been raised by him in the earlier O. 14 proceedings, to now re-open the same issues in a fresh action was an abuse of the power of the court and that to that extent *res judicata* in the wider sense applied. However on appeal on 14 June 1994 (Appeal No: 02-219-93 which was not reported), the then Supreme Court in *Dr. Ramachandran* allowed the appellant/plaintiff's appeal and ordered a full trial. I know this for a fact as I was then the counsel for the appellant.

In all the circumstances it was my considered judgment that this appeal ought to be dismissed with costs. I have therefore set the case in motion by having case management and this matter ought to be ready for trial shortly.

Reported by Bernadette Soosai